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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-364

DIRECTOR GENERAL OF THE INDIA SUPPLY MISSION FOR AND ON BEHALF OF THE PRESIDENT OF THE UNION OF INDIA,

Petitioner,

against

S.S. MARU (ex RIVERHEAD, ex THEOKEETOR), HER ENGINES, BOILERS, ETC., AND LUARCA CIA NAV. S.A.,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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BRIEF FOR RESPONDENT IN OPPOSITION

Jurisdiction

The jurisdictional requisites are adequately set forth in the petition.

Question Presented

Did the Second Circuit Court of Appeals properly hold that where a private contract of carriage incorporates the Carriage of Goods by Sea Act, 46 U.S.C.A., 1300 *et seq.*,

the presumptions of fault and burdens of proof contained therein should not be superseded by legal presumptions and statutes unrelated to the casualty in suit?

Statutes Involved

1. The United States Load Line Act (46 U.S.C. §85, *et seq.*) provides in part:

> "§85c. *Vessels so loaded as not to submerge lines or marks*
>
> It shall be unlawful for any vessel . . . to be so loaded as to submerge, in sea water, the load line or lines marked pursuant to said sections and to the regulations established thereunder applicable to her voyage; or so as to submerge under like conditions the point where such load line or lines ought to be marked pursuant to the provisions of said sections and of the regulations established thereunder; or so as in any manner to violate the said regulations."

2. The United States Carriage of Goods by Sea Act (46 U.S.C.A. §1304) provides in part:

> "(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the

carrier or other persons claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

* * *

(c) Perils, dangers, and accidents of the sea or other navigable waters;

* * *

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

Statement

This litigation concerns the stranding of respondent's vessel, the THEOKEETOR, off Grand Bahama Island while on voyage charter to petitioner, under a contract which incorporated the Carriage of Goods by Sea Act. (COGSA).

Following departure from Freeport Harbor on August 4, 1963, the vessel proceeded for about 25 minutes at a speed of 10 knots before suddenly grounding on an unmarked sand shoal. After partially off-loading cargo and bunkers, and setting up an extensive arrangement of anchors, cables and winches, professional salvors finally pulled the

THEOKERTON free eleven days after she had stranded. Cargo and bunkers were reloaded, and the voyage was completed without further incident.

Although the District Court found the vessel was unseaworthy in that her navigational chart for the Freeport area was not up-to-date and that she had sailed with an overdraft of 13 inches, the Court found and concluded that neither of these findings of unseaworthiness was causally related to the stranding. The out-dated chart was found to be irrelevant because the master had been following the established practice of navigating in that area by visual aids alone; the 13 inch overdraft was equally unimportant since even if the ship had been 13 inches lighter she still would have run hard aground and imbedded herself in almost four feet of sand*.

The Court therefore found and concluded that the sole cause of the stranding and the resultant cargo damage, salvage, and General Average expenses was the master's navigational error, an excepted cause under the contract of carriage. Petitioner's claims were dismissed, and the respondend was awarded judgment on its counterclaim for General Average contribution.

ARGUMENT

I.

There is no issue which requires the attention of this Court.

Under the guise of offering to help resolve a conflict between the Circuits, petitioner seeks further review of a decision which was unanimously affirmed by the Second Circuit Court of Appeals, and denied further review by that

*The ship's legal draft was 27' 9", and the water depth at the site of the strand was only 24 feet, a difference of 45 inches.

same court. The arguments presented by the petitioner here were fully considered by the Trial Court and the Circuit Court in reaching their decisions.

Petitioner erroneously alleges that contrary to the holding of the Fifth Circuit in a similar situation, the Second Circuit failed to follow the "Pennsylvania Rule" and presume the vessel at fault for violation of the Load Line statute. The short answer is that even if this Court should adopt petitioner's argument, it would make no difference here because the Second Circuit specifically stated:

> "Even applying the *Pennsylvania* test, the court below found that the overloading could not have had anything to do with the stranding, finding that the sole cause of the mishap was an error of navigation. While this finding is supportable, we cannot agree that the *Pennsylvania* rule is applicable" (10a).

In view of the foregoing, it is clear that petitioner argues a moot point, and for that reason alone, this petition should be denied.

II.

There is no conflict between the Fifth and Second Circuits.

Petitioner's chief reliance is on a Fifth Circuit decision, *Andros Shipping Co.* v. *Panama Canal Co.*, 184 Fed. Supp. 246, aff'd 298 F. 2d 720 (1962), which is claimed to be, "exactly opposite to the holding of the Second Circuit in the instant case." On the contrary, the facts in the *Andros* case are significantly distinguishable, and the Fifth Circuit decision is completely consistent with that now under review.

In the *Andros* case, a supertanker sheered and collided with a bank of the Panama Canal while transiting a narrow cut. In denying recovery for losses to the ship, the Court held there had been a failure to prove negligence of the Canal pilot. The evidence also established that the engine room was undermanned in violation of the Canadian Shipping Act, as a result of which engine room orders were improperly executed. Since the lack of proper engine room response had caused the ship to collide with the Canal bank, the Fifth Circuit stated in applying the Pennsylvania Rule:

> "the accident of the ANDROS VENTURE was of the sort that the safety statutes were designed to prevent . . .".

The Trial Court had also found other faults; altered logs, hull irregularities, inadequate power, poor rudder design, and overloading. This last fault was found to be directly related to the ship's ability to maneuver in the narrow Canal, and the Trial Court had held that this, too, required the application of the Pennsylvania Rule.

This rationale of limiting statutory fault to the danger it was designed to prevent, is precisely what was done in the decision below. The Second Circuit refused to accept petitioner's theory that every violation of every safety regulation should call into play the Pennsylvania Rule, irrespective of the purpose of the statute and the danger which it was intended to prevent.

The Second Circuit noted that the THEOKEETOS had no steering difficulties, and would have gone hard aground whether or not she had been 13 inches lighter in the water. Thus, even if the Pennsylvania Rule had been applied with respect to the Load Line Act, the presumptive fault was erased by this fact (10a). The Circuit Court then went on

to explain that application of the Pennsylvania Rule was unnecessary where the parties had already contracted that their rights would be determined under COGSA. Its reasoning was eminently sound, and in accordance with firmly established law.

COGSA contains positive requirements that the carrying vessel shall be seaworthy in all respects, properly manned, and entirely fit and safe to carry the cargo, 46 U.S.C.A. §1303. It also provides in Section 1304 that loss from unseaworthiness will be excused if due diligence was exercised to accomplish the foregoing requirements, but it specifically states that in all such instances,

> "the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section" (46 U.S.C.A. §1304(1)).

Stranding, fire, and other specific uncontrollable non-fault causes of loss are excused (46 U.S.C.A. §1304(2)(a to p); any other uncontrollable non-fault cause of loss can be excused under COGSA, but the burden of proving such cause is again laid squarely upon the carrier, 46 U.S.C.A. §1304(2)(q).

Applying this statutory order of proof to the present case, petitioner created a presumption of unseaworthiness by proving the strand; the vessel owner successfully rebutted by showing an excepted cause, i.e., an error in navigation. Petitioner then pointed to two areas of unseaworthiness—an outdated chart and a 13 inch overload—but it was unable to sustain the burden (common to every plaintiff) of causally relating the "faults" to the loss. *Commercial Molasses Co.* v. *New York Tank Barge Co.*, 314 U.S. 104. Instead, it tried to shift to the carrier the burden of proving non-causation. This was contrary to the statute incorporated in its contract, which had carefully prescribed all available presumptions.

III.

Intent of Congress.

Petitioner's unsupported statement respecting the Load Line Act, that strandings "were the very type of casualty that the Act sought to provide against" requires much more than an extraction of a single word from a major Congressional debate, and the conjuring of results which will never come to pass. Intentionally overlooked in this argument is that Congress had a clear purpose in passing the Carriage of Goods by Sea Act, to include the United States in that body of maritime nations which adopted the Hague Rules of 1921. The Hague Rules were designed to unify and standardize the principal provisions in ocean bills of lading, and in the area of carrier liability for all major maritime nations. Certainly it was not, or is not, the intention of Congress that this Act with such carefully tailored rules of responsibility, liability and presumptions, should be thrust aside in favor of special statutes which have been independently enacted by the various maritime powers for other purposes.

Petitioner ambivalently argues that the intent of Congress is immaterial, citing *Kernan* v. *American Dredging*, 355 U.S. 426, 438 (1958). However, the case is inapposite because this Court there applied the absolute liability provisions of the Federal Employees Liability Act, 45 U.S.C. §§51-60, as incorporated into the Jones Act, 46 U.S.C. §688. But in doing so, it distinguished the ordinary tort doctrine which is applicable to the case at bar:

> "Among the refinements developed by the common law for the purpose of limiting the risk of liability arising from wrongful conduct is the rule that violation of a statutory duty creates liability only when

the statute was intended to protect those in the position of the plaintiff from the type of injury in fact incurred" (p. 438).

The decision of the Court below that the intention of the Load Line Act was to save the lives of seamen by providing adequate freeboard for stability is clearly supported by numerous treatises (Gilmore and Black, *The Law of Admiralty*, 162-3, 779 (1957)) public records (70 Cong. Rec. 3793, 4829-30), and common sense.

IV.

Second Circuit Decisions.

In a final makeweight effort to butress its position, petitioner alleges that a different panel within the Second Circuit reached a conflicting decision in *Petition of Long*, 439 F. 2d 109, 113 (2nd Cir. 1971); this despite the fact that both Courts below clearly distinguished the *Long* case. In *Long*, the vessel owner was petitioning to limit its liability pursuant to 46 U.S.C. §181 et. seq., after its overloaded vessel had foundered and sunk in heavy seas. The burden of proof was thus governed by the Limitation Statute, and the COGSA burden of proof provisions were not at issue. More significantly, the *Long* accident was precisely the type which the Load Line Statute was intended to prevent. There, the Court properly applied the Pennsylvania Rule and held that the vessel owner had not proven its right to limit.

CONCLUSION

Petitioner has made no showing that this decision is in conflict with any reported decision, or that there is any other reason why this Court should consider the matter. The petition should be denied.

Respectfully submitted,

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